

Drama or Serenity? Upcoming Judicial Appointments at the Slovak Constitutional Court

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Michal Ovádek Mo 29 Jan 2018

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2018 is shaping up to be one of the most important years in the history of the Slovak Constitutional Court (SCC). Nine of the currently sitting 13 judges will see their non-renewable terms expire in February 2019. The new appointments have the potential to be shrouded in drama, as they will take place against the background of a constitutional and political power struggle over SCC appointments between the President and the government, as well as broader judicial malaise in the country.

Background

The immediate background to the upcoming appointment procedure can be found in the recently concluded (sort of) constitutional saga surrounding the appointment to the SCC of three judges nominated by the Parliament in 2014. For three years, Andrej Kiska, the current President elected in 2014 in a run-off against the Prime Minister, Robert Fico, was resisting to confirm the appointment of the candidates nominated by the Parliament prior to his election. He finally caved in – albeit without accepting the SCC’s constitutional interpretation – in December 2017 after the SCC ruled against the President and pointed to a potential violation of the Constitution if he were to continue resisting to sign off on the appointments. The *I-CONnect* blog just ran a symposium on this intriguing case (see also two Venice Commission opinions).

The deeper background relates to the political and judicial situation in Slovakia. Andrej Kiska is one of the few elected ‘beacons’ of liberal democracy in the region, as underlined most recently by the re-election of Miloš Zeman in the Czech Republic, who furthermore managed to disrupt the hegemony of Robert Fico and his party (‘SMER-SD’, transl. ‘Direction – Social Democracy’). Although it would be a mistake to put the latter in the same basket as Orbán or Kaczynski, from the perspective of liberal democratic values, Fico’s and SMER’s record has been tainted by persistent corruption allegations, rhetoric and inaction on Roma and migration, as well as limited willingness to address structural problems in education, health and justice.

While appointments to the SCC take place outside the ‘regular’ judicial system, the SCC’s constitutional responsibility – which among others includes review of human rights complaints – obligates one to see the essentially political nominations also in light of the general state of Slovakia’s justice sector. The public’s trust in the judiciary is chronically low, albeit somewhat improved on previous years, scoring 4.59 out of 10 in 2017 compared to 3.27 in 2012. The judiciary is long broadly split between a reformist group of judges and the old guard; in the most recent elections to the self-governing body (the Judicial Council), the reform-minded association of judges was routed. The pantomime villain of the Slovak judiciary, Štefan Harabin, continues to sit on the bench of the Supreme Court where he consistently, along with his allies, acquits policemen investigated by the police inspection,

which, granted, is mired in problems of its own, contrary to the practice of 'rival' Supreme Court judges (for the best academic treatment of the structural state of the Slovak judiciary post-1989 see the recent '*Perils of Judicial Self-Government in Transitional Society*' by David Kosař). The judicial and political power games have further manifested themselves in controversies concerning the appointment of ECtHR and EU General Court judges.

The upcoming appointment procedure

The constitutional kerfuffle surrounding the latest appointment process has prompted the ruling coalition to consider amendments to how SCC judges are appointed. Presently, Article 134 of the Constitution prescribes that the SCC is to have 13 judges who are appointed by the President for a non-renewable period of 12 years, on a proposal of the Parliament which draws up a list of candidates consisting of twice the required number of judges. This means that in the upcoming appointment process the President should be presented with a list of 18 judicial candidates, all of whom must (1) be at least 40 years old; (2) possess a law degree; and (3) have practiced law for at least 15 years.

The President and the Venice Commission, among others, have called on the government to make the criteria stricter. The main stated reason for the President's refusal to previously appoint the three disputed nominees was that they lacked the proper qualifications to be judges at the SCC. Implicitly, this was a recognition that Fico was trying to pack the Court with inadequate party loyalists, not an unreasonable suspicion given that two of the nominees were long-standing members of SMER-SD (one with a record of involvement at dubious universities as law professor).

As of yet, it is not clear whether, and if so, what the ruling coalition will propose in terms of amending the SCC appointment procedure. It is, for example, unclear whether the age limit should be raised, lowered or left intact, as there might be a shortage of highly suitable candidates already as it is. In any case, as the core of the process is enshrined in the Constitution, it is likely that any amendment will have to be of the constitutional kind which requires a qualified majority of at least 90 out of 150 MPs. Achieving this threshold would require the coalition government to obtain at least some support from the parliamentary opposition.

One seemingly laudable idea is to require a broader consensus in the Parliament when it comes to SCC nominations. The Parliament could agree on the list of candidates using a constitutional majority instead of a simple majority which would at present entail cooperating with the opposition. This would of course not prevent an Orbán-style constitutional capture should a single illiberal party obtain a constitutional majority in parliamentary elections. In more ordinary times, it would make for a more consensual appointment process, however.

A more radical idea, unlikely to be implemented in the short time available, would be to partition judicial nominations among different institutions. In 2016, the justice minister, and one of the few bright spots of the coalition government, Lucia Žitňanská, suggested that the SCC could be enlarged to 15 judges with five nominated by the Parliament, five by the President and five by the Judicial Council.

Whatever ultimately the solution, one additional factor might potentially complicate the 2019 SCC appointments. It is not only the nine SCC judges whose mandate is expiring in the spring of 2019; the next Presidential elections are scheduled to take place only a month after the new SCC judges should take office. Filibustering and stalling could therefore represent a strategy to sideline the current President who has proven openly adversarial to Fico's interests, even at the expense of a temporarily dysfunctional SCC.

Nevertheless, there is also reason to think that the SCC appointment procedure could be resolved in relative peace. For one, the government is no longer composed solely of SMER-SD, and Fico's coalition partners appear so far willing to act as a check on the appointment process. Second, all the coalition parties, most of all SMER-SD, should have an interest in avoiding a constitutional crisis or an obviously flawed list of candidates which could play in the hands of the extreme right and other anti-systemic forces. As long as he can appoint nine reasonable candidates out of the proposed 18, the President is likely to play along and avoid sparking another constitutional bout despite considering the SCC decision restricting the scope of his appointment powers, which runs in the opposite direction than the SCC's resolution of a previous controversy surrounding the appointment of the general prosecutor, to be deeply flawed.

The outcome of the upcoming SCC appointment process will exert considerable influence on Slovak constitutional justice until 2031. A smooth conclusion to this process ahead of the deadline would not only send a positive signal about the present state of constitutionalism in Slovakia but also represent a welcome reprieve for the region and the EU in view of the recent developments north, south and even west of this small country.

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